REMARKS

Applicant respectfully requests the Examiner to reconsider the above-captioned application in view of the foregoing amendments and the following remarks.

Personal Interview

Applicant would initially like to thank Examiner Lewis for the courteous telephone interview extended to Applicant's representative. In this Amendment, Applicant has amended this application as suggested during the interview.

Obvious-type Double Patenting Rejection

The pending claims are provisionally rejected on the grounds of nonstatory obviousness-type double patenting over co-pending Application Nos. 11/035,266 and 10/587,497. As noted during the personal interview, the present application and Application Nos. 11/035,266 and 10/587,497 are no longer co-owned. Because none of these applications have issued as a patent, Applicant respectfully requests this provisional rejection be held in abeyance.

Rejections based on Fradera (USPN 4,790,753) and Lazarof (USPN 5,762,500)

Claims 1-4, 17, 20, 22-26, 36-38, 41, 43, 45-49, 51, 54, 55, 57, 59-63, 65-68, 73, 75, 76, 78, 79, 82, 84 and 86-90 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. US 4,790,753 issued to Fradera (hereinafter "Fradera"). Claims 1-4, 17, 20, 22-26, 31, 34, 36-39, 41, 45-49, 51, 52, 54, 55, 59-63, 65-68, 73, 75, 76, 78-80, 82 and 86-90 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. US 5,762,500 issued to Lazarof (hereinafter "Lazarof"). Claims 6, 21, 27, 35, 69, 71, 72 and 77 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Fradera in view of U.S. Patent No. US 5,591,029 issued to Zuest (hereinafter "Zuest"). Claims 6, 21, 27, 35, 69, 71, 72 and 77 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Lazarof in view of Zuest. Claims 39, 44, 52, 58, 80 and 85 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Fradera. Claims 43, 44, 57, 58, 84 and 85 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Lazarof.

To advance prosecution, Applicant has amended independent Claims 1, 23 and 65 as discussed during the interview with Examiner Lewis. Applicant reserves the right to pursue the previously pending claims or claims of similar scope in a continuing application.

Independent Claim 1 now recites, in part ,grooves "in the first inner surface that do not extend completely through the body to the external surface, the first inner surface defining an opening facing in an apical direction."

Claim 23 now recites, in part, "the grooves not extending through the body of the implant to the external surface, and the first inner surface defining an opening facing in an apical direction."

Claim 65 now recites, in part, "the grooves not extending through the body of the implant to the external surface, the first inner surface defining an opening facing in a generally apical direction."

As discussed in the interview, Fradera and Lazarof do not disclose an implant with the above-noted features. For at least this reason, Applicant submits that these Claims and their dependent claims are in condition for allowance.

Rejection under 35 U.S.C. § 102(e) in view of Cantor (2005/0164146 and 2007/0292820)

In a previous response, Applicant has submitted a declaration establishing an actual reduction to practice before the effective filing date of Cantor. Accordingly, it is respectfully submitted that the rejection over Cantor has been overcome.

The most recent Office Action states that the "131 declaration is ineffective with respect to Cantor reference because the reference is a U.S. Patent or U.S. patent application publication of a pending or patented application that claims the rejected invention."

Nevertheless, Applicant respectfully submits that the present application be allowed and passed onto issuance.

MPEP 2301.01 states (emphasis added) that:

> Example 2
>
> Two applications, C and D, with interfering claims are pending. Examination of application C is completed and all claims are allowable. Examination of application D is not completed. Application C should be issued promptly. If application C has an earlier effective U.S. filing date when issued as patent C, or when published as application publication C, it may be available as prior art under 35 U.S.C. 102(e) against application D. **However, even if application C's effective filing date is later than application D's effective filing date, application C should issue**. Until examination of application D is completed, it is not known whether application D should be in interference with application C, so suspension of application C will rarely, if ever, be justified.

In a similar manner, MPEP 2305 states (emphasis added):

> I. RELATIONSHIP TO 37 CFR 1.131 AFFIDAVIT
> Ordinarily an applicant may use an affidavit of prior invention under 37 CFR 1.131 to overcome a rejection under 35 U.S.C. 102(a) or 102(e). An exception to the rule arises when the reference is a patent or application published under 35 U.S.C. 122(b) and the reference has claims directed to the same patentable invention as the application claims being rejected. 37 CFR 1.131(a)(1). The reason for this exception is that priority is determined in an interference when the claims interfere. 35 U.S.C. 135(a). In such a case, the applicant must make the priority showing under 37 CFR 41.202(d) instead. In determining whether a 37 CFR 1.131 affidavit is permitted or not, the examiner should keep the purpose of the exception in mind. If an interference would not be possible at the time the affidavit would be submitted, then the affidavit should be permitted. This situation could arise two ways.
>
> First, the claims that matter for the purposes of 37 CFR 1.131 are not the published claims but the currently existing claims. For example, if the claims that were published in a published application have been significantly modified during subsequent examination, they may no longer interfere with the rejected claims. Similarly, the patent claims may have been subsequently corrected or amended in a reissue application or a reexamination. Since an interference no longer exists between the current claims in the patent or published application and the rejected claims, an affidavit under 37 CFR 1.131 may be submitted.
>
> **Similarly, if a published application contains claims to the same invention, but the claims in the published application are not in condition for allowance, then no interference is yet possible. 37 CFR 41.102. Since the claims in the published application might never be allowed in their present form, it is not appropriate to proceed as though an interference would be inevitable. Consequently, an affidavit under 37 CFR 1.131 may be submitted.**

Accordingly, Applicant respectfully submits that the previously submitted 131 declaration is sufficient to overcome the present rejections over the Cantor applications so that the present application can be allowed and issued.

No Disclaimers or Disavowals

Although the present communication may include alterations to the application or claims, or characterizations of claim scope or referenced art, the Applicant is not conceding in this application that previously pending claims are not patentable over the cited references. Rather, any alterations or characterizations are being made to facilitate expeditious prosecution of this application. The Applicant reserves the right to pursue at a later date any previously pending or

other broader or narrower claims that capture any subject matter supported by the present disclosure, including subject matter found to be specifically disclaimed herein or by any prior prosecution. Accordingly, reviewers of this or any parent, child or related prosecution history shall not reasonably infer that the Applicant has made any disclaimers or disavowals of any subject matter supported by the present application.

CONCLUSION

Applicant respectfully submits that the above rejections and objections have been overcome and that the present application is now in condition for allowance. Therefore, Applicant respectfully requests that the Examiner indicate that the pending claims are now acceptable and allowed. Accordingly, early issuance of a Notice of Allowance is most earnestly solicited.

Applicant respectfully submits that the claims are in condition for allowance in view of the above remarks. Any remarks in support of patentability of one claim, however, should not be imputed to any other claim, even if similar terminology is used. Additionally, any remarks referring to only a portion of a claim should not be understood to base patentability on that portion; rather, patentability must rest on each claim taken as a whole. Applicant respectfully traverses each of the Examiner's rejections and each of the Examiner's assertions regarding what the prior art shows or teaches, even if not expressly discussed herein. Although amendments have been made, no acquiescence or estoppel is or should be implied thereby. Rather, the amendments are made only to expedite prosecution of the present application, and without prejudice to presentation or assertion, in the future, of claims on the subject matter affected thereby. Applicant also has not presented arguments concerning whether the applied references can be properly combined in view of, among other things, the clearly missing elements noted above, and Applicant reserves the right to later contest whether a proper reason exists to combine these references and to submit indicia of the non-obviousness of the claimed management system.

The undersigned has made a good faith effort to respond to all of the rejections in the case and to place the claim and drawings in condition for immediate allowance. Nevertheless, if any

undeveloped issues remain or if any issues require clarification, the Examiner is respectfully requested to call Applicant's attorney in order to resolve such issue promptly.

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

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By /Rabinder N. Narula/
Rabinder N. Narula
Registration No. 53,371
Attorney of Record
Customer No. 20995
(949) 760-0404

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